
United States Court of Appeals

NINTH CIRCUIT

NO. 20967

MARVIN LUSTIGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the
District of Arizona, Hon. James A. Welch, Judge.

APPELLANT'S SUPPLEMENTAL
AND
REPLY BRIEF

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INTRODUCTORY COMMENT

For the reasons hereinafter set forth, counsel believes there are certain statements and representations made in Appellee's Brief which cannot go unchallenged, in that Government counsel has a dual responsibility being both an attorney and a representative of the Government.

In *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314, the court made the following comments concerning the duties and responsibilities of a United States Attorney:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense a servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every means to bring about a just one." (295 U.S. 78, 88)

In the very recent case of *Giles v. Maryland*, ___ U.S. ___, 17 L. Ed. 2d 737, 744, the Supreme Court stated:

" . . . In *Napue v. Illinois*, *supra*, 360 U.S. at 269, 3 L. Ed. 2d at 1220, we held that a conviction must fall under the Fourteenth Amendment when the prosecution 'although not soliciting false evidence, allows it to go uncorrected when it appears,' even though the testimony may be relevant only to the credibility of a witness . . . "

See also *Miller v. Pate*, ___ U.S. ___, 17 L. Ed. 2d 690.

It is respectfully submitted that opposing counsel has been,

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euphemistically speaking, somewhat less than candid in making disclosures to this Court concerning the evidence procedures in the trial court and, through significant omission of the factors known to her, failed in her duty to this Court to fully and fairly present the case for the Government.

EXAMPLES:

1. On page 9 of Appellee's Brief, first full paragraph, Government's counsel sets forth the items that were sent through the mail by appellant in furtherance of the alleged scheme to defraud. Counsel has omitted in the list of such mailings the "fact sheet" which, indisputably, was also sent by appellant to prospective purchasers (Exhibit 39 Series, RT 96; page 27 of Exhibit 37 Series).

As will be further seen in this Brief, the failure by Government counsel to refer to this "fact sheet" was not inadvertence, since it is in all probability the single most important document introduced in evidence to support appellant's contention that there were no misrepresentations and that he never engaged in a scheme to defraud.

2. On page 11 of Appellee's Brief, it is stated that "The photographs of bodies of water included on page 21 of the brochure (Gov't Ex. 37) were taken not on Lake Mead City property but rather at the Diamond Bar Ranch (RT 255, 56)." This statement again represents a distortion of the facts and evidence on the part of the Government. Nowhere did appellant represent that the Diamond Bar Ranch was owned by him. Rather,

all that was represented was that the Diamond Bar Ranch is within the boundaries of Lake Mead City -- this is a fact. (Ex. 52)

In its Brief, at page 11, the Government also states:

"Similarly, domestic water was not available, as a practical matter, on any of the land. Residents would have had to buy delivered water or obtain it from a well on the Diamond Bar Ranch, and, if the land was developed, Lake Mead City might well have faced a water shortage. (Gov't. Ex. 50, p. 2-3) The Clearwater well is the only source of water controlled (i.e., under option by the Lake Mead Company, RT 298, 361)."

Anyone as familiar with the facts of this case as counsel for the Government must undoubtedly be, knows that Clearwater Well (also named "Lucky Seven Well") was at all times owned by Lake Mead and was never under option. Counsel's references to Reporter's Transcript pages 298 and 361 simply do not support the representation made by the Government to this Court with respect to the water situation on Lake Mead subdivision.

3. On page 42 of the Appellee's Brief it is stated:

"If the deed [referring to the warranty deed] (Government Exhibit 42) [which appellant contends should not have been introduced into evidence] were not offered, then Lustiger would contend the Government was inferring he didn't issue deeds."

Counsel, again, is less than forthright with her presentation of the facts to this Court. The undersigned counsel is informed that in the rebuttal argument made to the trial court (which was never reported) Government counsel stated to the court that appellant knew he was conveying false title, so he "manufactured" a deed that looked like a warranty deed but was in fact a quitclaim deed.

In the first place, it was well known to the Government prior to the trial that, through prior deed transactions on the land before Lake Mead ever acquired title, Lake Mead was having problems in conveying free and clear title to the purchasers and that the matter of the question as to the title that could be passed was then in litigation in the Arizona courts. It was for this reason that the Government stipulated that the question of title was no part of the alleged "scheme to defraud." (See Exhibit 10, paragraph 36)

The second omission which Government counsel failed to state to the trial court and to this Court is that the deed which Lake Mead issued is, to the best information of the undersigned, a copy of the form deed used by title companies in Arizona for conveying property in trust.

Finally, it may be of interest to this Court to know that every purchaser of land in Lake Mead City now has clear and unimpaired title to that land.

4. With respect to appellant's contention of inadequate counsel *at trial*, the Government's response is truly astonishing.

First of all, it is submitted that Government counsel has information in her possession regarding the mental and emotional state of trial counsel which she has refused to reveal or acknowledge, although written demand has been made for her so to do.

Secondly, it is submitted that Government counsel may not be

in a position, either emotionally or by lack of experience, to judge whether Mr. Madden was a competent *criminal defense attorney*. Perhaps the vice in this type of trial is that both the Government counsel and the trial counsel were complete novices in the trial of a criminal mail fraud case.

It is true that Mr. Madden was one of the finest lawyers in the State of Arizona, if not the United States, with respect to land title problems. His preparation for trial was thorough and meticulous and, in every sense of the word, professional.

At that point his professional competence ended. When he entered the criminal trial, he was out of his water. There is little connection between the trial tactics and law of a civil case and that of the criminal case, and competence and knowledge in one area do not necessarily carry over into the other. The comparison does not exist. To say that it does is analagous to the fallacy of proclaiming a certain underarm deodorant to be the best because Albert Einstein used that deodorant and he was a mathematical genius.

Perhaps the finest compliment this counsel could have paid to Mr. John Madden is that for the purposes of the Appellant's Opening Brief, a great deal of Mr. Madden's work was plagiarized, because, for the most part, it was found to be extremely accurate. Apparently Government counsel feels that if a brief contains material which is copied, then it must be erroneous. *Non sequitur*.

GENERAL RULES OF LAW
APPLICABLE TO MAIL FRAUD CASES

It is almost unnecessary to state that a violation of Title 18 U.S.C. Sec. 1341 requires the finding of (1) a scheme to defraud (2) by use of the mails. *Parr v. United States*, 363 U.S. 370, 80 S. Ct. 1171, 4 L. Ed. 2d 1277. While there is some disagreement among the authorities, the better reasoned cases hold that someone must, in fact, be defrauded for a mail fraud violation to be complete. Thus, in *United States v. Brunet*, 227 F. Supp. 766 (W.D. Wisc. 1964) the court stated:

"In *United States v. Rabinowitz*, 6 Cir., 327 F. 2d 62, at page 76, decided January 22, 1964, the court cited the *Baren* case [*United States v. Baren*, 2 Cir., 305 F. 2d 527] and said as follows:

"'This was the Government's case. In every mail fraud case there must be a scheme to defraud, representations known by defendants to be false and some person or persons must have been defrauded. * * * The scheme to defraud must have included the intent to do so. Even if the statements complained of were false, defendants must have known them to be false and they must have intended to defraud in order to be found guilty.'"

"There are cases which hold that it need not be shown that someone suffered a loss. Indeed, the Standard Instructions in 27 F.R.D., p. 152, §21.09 . . . [so provides]."

"However, the court believes that inasmuch as the *Baren* and the *Rabinowitz* cases, *supra*, are so recent, it is inclined to follow them in this and future cases. . . . " (at p. 772)

Thus, if as contended by appellant the land sold by appellant was worth an amount equal to or greater than the price paid by the purchaser, the foregoing cases are authority for the proposition that appellant could not properly be convicted of mail fraud. It should

be noted that several witnesses believed the land purchased by them had substantially risen in value (RT 428, 563, 617).

It should also be noted that even if a purchaser did not get as much value as he was promised, but actually got no less than that for which he paid, there can be no fraud. *Milter v. United States*, 174 Fed. 35 (7th Cir. 1909)

Good faith on the part of the defendant is a complete defense to a mail fraud prosecution. *Gold v. United States*, 36 F. 2d 16 (8th Cir. 1929); *Harris v. United States*, 261 F. 2d 792 (9th Cir. 1958). In addition, if a person is a visionary with respect to his plans and actually believes his plans will succeed, there can be no violation of Section 1341. *United States v. Corlin*, 44 F. Supp. 940 (S.D. Cal. 1942). Also, a promise to refund the purchase price made in good faith negates an intent to defraud. *Harrison v. United States*, 200 Fed. 662 (6th Cir. 1912). It is important to note that the refund offer made in the *Harrison* case is quite similar to the one made by the appellant in the instant case. The Court's attention is also directed to *Gordon v. United States*, 358 F. 2d 112 (5th Cir. 1966) which deals with an analogous problem.

Furthermore, mere "seller's talk" or "puffing" does not subject a person to prosecution for mail fraud. *United States v. Rabinowitz*, 327 F. 2d 62 (6th Cir. 1964) (See discussion, *infra*); *United States v. Staples*, 45 Fed. 195 (D.C.W.D. Mich. 1890). Exaggerations in business advertising do not constitute criminal conduct. *Faulkner v. United*

States, 157 Fed. 840 (5th Cir. 1907).

The courts have also laid down the following rules for appellate courts in reviewing a mail fraud prosecution:

1. Where the evidence is as consistent with innocence as with guilt, the appellate court must reverse the conviction. *Harrison v. United States*, *supra*; *Yusem v. United States*, 8 F. 2d 6 (3rd Cir. 1925); *McClintock v. United States*, 60 F. 2d 839 (10th Cir. 1932).

2. Where guilt depends entirely on circumstantial evidence, proof of guilt must not only be beyond a reasonable doubt, but to the exclusion of every reasonable hypothesis of innocence. *Epstein v. United States*, 174 F. 2d 754 (6th Cir. 1949).

3. Fraud is never presumed; rather, it must be proved by clear and satisfactory proof. *St. Clair v. United States*, 23 F. 2d 76 (9th Cir. 1927).

4. Where, as in the instant case, the sufficiency of the evidence is attacked, the appellate court must conduct a meticulous review of the entire record and all exhibits. *United States v. Rabinowitz*, *supra*.

III

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION

For convenience, the indictment can be divided into six different classes of alleged misrepresentations or conduct engaged in pursuant to

the alleged scheme to defraud. Thus, Paragraphs 2 through 6¹, inclusive, of the indictment may be grouped together for the purpose of discussion, and Paragraphs 7, 8, 9, 10 and 11, respectively may be discussed separately.

INDICTMENT, PARAGRAPHS 2-6

Paragraphs 2 through 6, inclusive, essentially charged the appellant with doing the following:

1. Organizing Lake Mead Land & Water Company (hereinafter referred to as "LM") as a corporation, becoming an officer thereof and actively engaging in its business (Paragraph 2).
2. Using Post Office Box 13349, Phoenix, Arizona, as the mailing address for LM (Paragraph 3).
3. Causing LM to enter into contracts to purchase approximately 35,000 acres of unimproved Mojave County land and subdividing some of them (Paragraph 4).
4. Offering for sale to the public parcels within such subdivisions on a deferred-payment plan (Paragraph 5).
5. Entering into contracts with the public for the sale of parcels within such subdivision (Paragraph 6).

¹ All references are to Count I of the indictment, since the remaining counts incorporated by reference the salient allegations of Count I.

It seems clear that none of these statements could conceivably be held to constitute wrongdoing in and of themselves. Only if the alleged fraudulent misrepresentations set forth in the subsequent paragraphs of the indictment were false do the statements in Paragraphs 2 through 6 have any meaning.

INDICTMENT, PARAGRAPH 7

It therefore appears that the alleged false statements contained in Paragraph 7 of the indictment must first be examined. Each alleged false statement contained in Paragraph 7 is discussed below, following a recitation of each such statement.

Paragraph 7, subparagraphs (a), (b), (c), (e), (i), (j), (k), and (q) are as follows:

(a) "Join us for Pleasure and Profit at Lake Mead City, Arizona."

(b) "Lake Mead City an enchanted city in the making, a truly outstanding New Frontier for wise investors."

(c) "Lake Mead City. Arizona's best located planned community."

(e) "Lake Mead City planning and restrictions assure you of properties that will always be favorably looked upon by discriminating purchasers."

(i) "Seldom, if ever, will you find it possible to purchase so much good land for such a low price."

(j) "You can be a property owner of land that is considered among the finest ever offered for sale in the State of Arizona."

(k) "The best located resort property in the West."

(q) "Arizona's best located, best planned resort area, convenient to both year 'round water sports at Lake Mead and

the majestic beauty of the Grand Canyon."

Clearly, all of the foregoing statements represent no more than "seller's talk" or "puffing," which are not made criminal by Section 1341. *United States v. Rabinowitz, supra; United States v. Staples, supra.* The same is true of exaggerations by the seller concerning his product. *Faulkner v. United States, supra.*

If the statements contained in the subparagraphs set forth above (*e.g.*, "Join us for Pleasure and Profit at Lake Mead City, Arizona") are susceptible of being interpreted as fraudulent misrepresentation, then every seller of goods in America who uses the mails to disseminate his advertising is a criminal.

Subparagraph (d), which states "Invest in this booming area now," can be disposed of summarily. This is not even a representation of fact, but a bare suggestion. It is inconceivable that this statement could be held to be a fraudulent misrepresentation².

Subparagraphs (f), (g) and (h) are as follows:

(f) "Now, for only pennies a day, you can participate in one of the best planned and fastest selling resort areas in Arizona."

(g) "When subdivision takes place, in choice locations such as Lake Mead City, history shows land values rise rapidly."

(h) "When development takes place, such as Lake Mead City, history shows that land values rise rapidly."

² Parenthetically, subparagraph (a) may, in fact, more resemble subparagraph (d) than it does subparagraphs (b), (c), (e), (i), (j), (k) and (q).

If subparagraphs (f), (g) and (h) are not "seller's talk," they come as close as is possible to acquiring that status. In any event, the record does not reflect nor does the Government point to any evidence which refutes the truth of these statements. In fact, with respect to subparagraphs (g) and (h) the Court can take judicial notice of the fact that land values almost always rise when development of raw land occurs.

Although the matter is not extremely free from doubt, it may be that all of the remaining subparagraphs of Paragraph 7 of the indictment could be held to be representations, the falsity of which would expose the appellant to criminal sanctions. It is submitted, however, that a careful review of the record in this case supports appellant's contention that none of the statements were false. The remaining subparagraphs of Paragraph 7 are discussed below.

Subparagraph (1) provides:

"Location more than any other factor determines land values. Lake Mead City enjoys a superb, unique location. Lake Mead City is the only nationally advertised major project of its type, actually starting with the Lake Mead National Recreation Area. Most of the property in this area is Federal Land and is not available at any price. This tends to push prices higher and higher for the choice, privately-owned, deeded properties in Lake Mead City. Get yours now!"

Exhibit 58, Stipulation 18, expressly provided that certain portions of the Lake Mead property were within the boundaries of the Lake Mead National Recreation Area. Subparagraph (1) is, therefore, true.

Subparagraph (m) provides:

"Most of the region shown on this map consists of Federal Land, and is not available at any price. This makes the choice privately owned, deeded properties in Lake Mead City all the more valuable, and future price increases seem well-assured."

Again, this statement is not false, since most of the region shown on the map furnished by appellant to prospective purchasers was Government-owned land and not available at any price. (Exhibit 24a; Exhibit 23; Stipulation 58, par. 17)

Subparagraph (n) provides:

"Land values in the Lake Mead City area have increased over 50% in the last few months, as subdivisions have progressed, yet you may still acquire a large estate for cigarette or coffee money. Act now, while you can still buy at original subdivider's prices. Watch land values increase as activity heightens."

With respect to this statement, and assuming most of it is not mere puffing, three witnesses presented unrefuted testimony that the land values had increased substantially. Thus, one witness testified that his land value increased over 50% (RT 427-428), one testified the increase exceeded 43% (RT 560, 563), and another testified the increase was almost 80% (RT 617). Counsel for appellant does not recall any testimony introduced by the Government to indicate that the land had not increased in value. As indicated above, if land values did in fact rise, no one was defrauded and there can be no conviction.

United States v. Rabinowitz, *supra*; *Milner v. United States*, 174 Fed. 35 (7th Cir. 1909). In *Milner*, the court stated:

"It will thus be seen that in all these cases there is present, as a central element of the scheme, intention to defraud the persons addressed, not out of expectations excited (the expectations were the means used only) but

out of the money, or a portion thereof, contributed by them to the scheme. In none of these cases is the mere false pretense or false representation, apart from an actual intended deprivation of the person addressed of the money obtained, held to be an offense under the section in question. In other words, in all of these cases the gist of the offense is the actual or intended injury to the person sought to be reached - fraudulently depriving him of something that he already has - and in none of them is the deprivation of the person addressed of only that which he was led to expect, made the basis of the prosecution.

"Suppose that Mattson and Foster, the persons named in the first two counts, did not get employment, would they be defrauded, provided they got their outlay back? Defrauded of what - of the expected employment? Apart from what was falsely held out to them, they had no claim on such employment. Defrauded of an investment that would pay 20%? Apart from what was falsely held out, they had no claim to such an investment. How can they be said to be deprived of anything that has no existence, except in the false promise itself; and if there has been no intention to deprive, there cannot, within the meaning of this section, be an intention to defraud; *for to be defrauded, the person must be deprived by deceit or artifice of something that he has the right to hold or claim, not in virtue of the deceit or artifice, but as against such deceit or artifice.*" (Emphasis added.) (174 Fed. 35, 39.)

Subparagraph (o) provides:

"Land values in Lake Mead City have increased over 50% in the last few months, as development has progressed, yet you may still acquire a large estate for cigarette or coffee money. Act now! Watch land values increase as development continues."

It is respectfully submitted that the discussion set forth immediately above relative to subparagraph (n) is equally applicable to subparagraph (o).

Subparagraph (p) provides:

"Thousands of wise investors have already decided that our

special offering represents a worthwhile holding, for future profit. Substantial price boosts are indicated as the nationwide demand increases for this choice private property."

The truth of this statement is conceded by the Government, since, on page 8 of its Brief, it is stated that "By March 10, 1962, approximately 3,000 lots had been sold with 200 having been paid for in full." This statement is also supported by the record. (RT 361, Exhibit 44)

Subparagraphs (r), (s) and (t) provide as follows:

(r) "Less than five miles from the Lake."

(s) "Lake Mead City actually begins less than five miles from the Lake."

(t) "Lake Mead City begins less than five miles from the Lake."

These subparagraphs do not state that all property owned by Lake Mead City was located less than five miles from Lake Mead, but that property begins less than five miles from the lake. Since some of the property was, in fact, located within five miles of the lake, these statements are in no way false. In fact, it was stipulated that, on a straight line basis, the closest of Lake Mead City subdivision units to the nearest place on Lake Mead, accessible by presently existing roads, was approximately four miles, and the farthest was approximately seventeen miles. (Exhibit 58, Stipulation 22)

Subparagraph (u) provides:

"Lake Mead City nests in the center of hugh recreational developments. Properties are located within a beautiful Joshua tree forest, and in the heart of the Lake Mead National Recreational Area."

The fact that some of the property owned by Lake Mead City was located

within the recreational area and all of the property was located very near the recreational area serves to illustrate the fact that this statement was not false. Additionally, the Government's own witness conceded that the Lake Mead City property was located in beautiful country (RT 407).

Subparagraphs (v) and (w) provide as follows:

(v) "These estates nest in the center of the West's greatest recreational facilities.

(w) "Here is your once-in-a-lifetime opportunity to become a land owner of estate-size property in the heart of one of the West's largest recreational areas."

It seems clear that both of these subparagraphs are mere "puffing."

In any event, the use of the absolute superlative in subparagraph (v) was certainly qualified by use of the phrase "one of the West's largest" in subparagraph (w).

Subparagraphs (x), (y), (z) and (aa) provide as follows:

(x) "County roads have existed in Lake Mead City for several years, and are maintained by the county."

(y) "County roads have existed in Lake Mead City for several years, and are maintained in proper condition at all times."

(z) "Lake Mead City is easily reached, with access via U. S. Highways and County Roads. An airfield and a boat anchorage are nearby."

(aa) "Modern schools, churches and shopping facilities in nearby Kingman, the county seat, and the largest city in northwest Arizona."

None of the foregoing four subparagraphs contain false statements. The evidence showed that the sections of land owned by Lake Mead City are located roughly sixty miles from rapidly expanding Kingman, Arizona

(RT 458-459). Further, the property owned by Lake Mead could be reached by utilizing any one of three routes: Highway 93 and the Pierce Ferry Highway; the Hilltop route; and the Hackberry route. (RT 393-395; 444-445; 286-288). All of these roads were county-maintained, and since 1958, with the advent of subdivision activity in the area at Lake Mojave Ranchos (RT 448-449; 289-291), Meadview (RT 296-297; 454-455) and at Lake Mead City (RT 294-295), the roads were gradually improved (RT 439-447). In addition to these county-maintained roads, there were numerous ranch roads in these sections (RT 443; 260-261).

Subparagraph (bb) provides:

"All our properties are within the franchised area of Citizens Utilities Company, with regard to power and telephone."

Appellant's counsel is unable to find any reference in the record which would tend to indicate that the statement contained in this subparagraph is, in fact, false.

Subparagraph (cc) provides:

"IMPORTANT! Plenty of water."

In its Brief, at page 11, the Government states:

"Similarly, domestic water was not available, as a practical matter, on any of the land. Residents would have had to buy delivered water or obtain it from a well on the Diamond Bar Ranch, and, if the land was developed, Lake Mead City might well have faced a water shortage.
. . ."

Nowhere in Lake Mead's brochure was it represented that the subdivision had piped-in water. All the brochure said was that water was plentiful, and this was, in fact, true. Exhibit 58, Stipulations 24, 25 and 26

(see also RT 298) clearly demonstrate that water was available for the Lake Mead subdivision. Furthermore, according to the statement contained in the Government's Brief, Clearwater (or "Lucky Seven") Well was under option. (This statement in the Government's Brief is incorrect. Counsel is informed that this well was at all times owned by appellant and that another well had been dug by Lake Mead prior to indictment and a third was under option - all of which was known to the Government.) Exhibit 38a clearly shows that the Clearwater Well is located on Lake Mead's property. The appellee also fails to indicate that the obtaining of water by having it delivered in a tank truck is, rather than being unusual, the most common method of obtaining water in the Arizona desert areas.

Subparagraphs (dd) and (ee) provide:

(dd) "All our units have been surveyed, subdivided, platted and recorded. All road easements are provided to assure you of access."

(ee) "All parcels have been platted and recorded, with road easements laid out to assure you of access."

With respect to subparagraph (dd), there is no question that this statement is absolutely precisely correct. All units had been properly surveyed and subdivided and recorded - all in accordance with the Arizona Department of Real Estate and had been approved by them. They were recorded with the Mojave County Recorder (Ex. 26, Ex. 28, Ex. 58, Stipulation 14; RT 370). The word "plat" simply means: "A map, or representation on paper, of a piece of land subdivided into lots, with streets, alleys, etc.; usually drawn to a scale." (Black's Law Dictionary, 4th Edition)

The statement that "all road easements are provided to assure you of access" is also a true statement, since easements were provided although the roads may not yet have been physically placed on the land. The representation was that all parcels had access by way of platted recorded maps. This is confirmed by the statement which is part of subparagraph (ee), "All parcels have been platted and recorded, with road easements laid out to assure you of access."

INDICTMENT, PARAGRAPH 8

Appellant is also charged with misrepresentations as set forth in Paragraph 8 of the indictment. A thorough review of the record indicates that no misrepresentations were made with respect to the statement set forth in Paragraph 8. The individual subparagraphs of Paragraph 8 are discussed in the following paragraphs.

Paragraph (a) concerns a representation made in one of appellant's brochures to the effect that the picture contained on page 25 of the brochure was "a photograph of a water pond with the caption 'favorite swimming hole' thereunder." Assuming that such statement could even be the subject of a fraudulent misrepresentation, Exhibit 52 indicates that the company's independent engineer stated that the picture on the top of page 25 "was taken by Mr. Miller and again is a picture of the watering tank at the Diamond Bar Ranch, a watering tank which the ranch foreman's children, to my knowledge, used for swimming." Contrary to the statements contained in the Government's Brief, witness Christianson testified that his children had been in the swimming pool on no less

than six occasions. (RT 290-291)

Subparagraph (b) charges misrepresentation with respect to "a picture of a house with the caption 'and comfortable ranch house' thereunder, on page 25 of said brochures." The statement made in appellant's brochure was that a comfortable ranch house existed on Lake Mead's subdivision. In Exhibit 52, the company's independent engineer again corroborates the fact that such a ranch house existed. How or in what manner this is misleading is not indicated by the Government, and the answer is not known to counsel for appellant.

Subparagraph (c) charges misrepresentation in stating that all of the scenes in the brochures "were . . . photographed within the boundaries of Lake Mead City...a wonderful place to enjoy life." Again, the statement by the company's independent engineer, contained in Exhibit 52, seems to indicate that this statement is true.

Subparagraph (d) incorporates a statement from page 29 of appellant's brochure: "This brochure contains pictures of portions of booming Arizona, including a large group of actual photographs of scenes at Lake Mead City, and the adjoining Lake Mead National Recreation Area, part of which is included within Lake Mead City." The same statement applicable to subparagraph (c) is applicable to this subparagraph.

Subparagraph (e) contains the alleged misrepresentation:

"IMPORTANT! Plenty of water . . ." As indicated above, water was plentiful on the Lake Mead subdivision, and all of the photographs were taken within the boundaries of Lake Mead City. This paragraph, then, forms no basis for an allegation of misrepresentation.

Subparagraph (f) asserts misrepresentation in stating that "Lake Mead City begins less than five miles from the lake." Exhibit 58, Stipulation 22, clearly indicates that certain portions of the Lake Mead subdivision were located approximately four miles from Lake Mead itself.

Subparagraph (g) apparently charges misrepresentation by providing each prospective customer with a vicinity map on which was shown two wells, three springs and a water pipe line. Since each of these items was physically present on the Lake Mead subdivision, it is difficult to understand how or in what manner the map constituted a misrepresentation.

INDICTMENT, PARAGRAPH 9

Very little comment is required with respect to Paragraph 9. Basically, the allegation is that the appellant did not take special care to select choice lots in the area. Yet, the record reflects that such was not the case. This is corroborated by the fact that Exhibit M indicates that as of August 31, 1963, Lake Mead City had expended \$36,552.61 for engineering and development and \$263,689.42 for land acquisition.

INDICTMENT, PARAGRAPH 10

Paragraph 10 basically contains allegations that appellant represented that the land values were increasing, whereas, in fact, they were not. Since this issue has been treated in previous portions of this Brief, no further discussion will be undertaken at this time.

INDICTMENT, PARAGRAPH 11

Paragraph 11 of the indictment charges the appellant with "withholding from and not clearly revealing in their advertising" certain material facts. The phrase "not clearly revealing" is very vague and imparts to the appellant no particular information with respect to the extent to which his conduct was wrongful. Despite this fact, appellant will attempt, in the following paragraphs, to demonstrate that each of the subparagraphs contained in Paragraph 11 contain truthful statements.

Subparagraph (a) provides:

"The said Lake Mead subdivision units all are located on odd-numbered sections of land, widely scattered geographically in five different townships, in which townships the even-numbered sections of land are owned by the federal government and subject to use for grazing purposes."

The answer to these allegations is that in the fact sheet forwarded by appellant to all prospective purchasers (see p. 27 of the Exhibit 37 series), appellant clearly stated that "Most of the land in this area is owned by the United States Government, and is not for sale, at any price." Further, it is submitted that the Government failed to prove either that revelation of the fact that the Lake Mead City subdivision units were all located on odd-numbered sections of the land was necessary

or that the fact that property is located on odd-numbered sections of land is any impediment to the development of such land.

Subparagraph (b) provides:

"Many of the said Lake Mead City subdivision units have rocky hills and unbridged natural drainage washes thereon.

It is submitted that all of the evidence produced by the Government concerning the mountainous nature of certain portions of Lake Mead City subdivisions (RT 273, 311, 348, 349, 356, 357, 379; Exhibit 60, 60A, 60B) is meaningless when it is remembered that one of the areas of prime concern for the Government (Unit 17-28-60) was set aside as a game refuge (Exhibit 26). Similarly, the Government's evidence about the "big wash" in Unit 7-30-60 (RT 262, 263, 383) was also rendered nugatory, insofar as affording any predicate for a fraud charge is concerned, when it is remembered that the 50-year rain (RT 332) which had so transformed this section (RT 309, 310, 311) occurred in the fall of 1962 (RT 405, 406), not in 1961 (RT 307, 308). By that time, Lake Mead had long ceased selling parcels (RT 367) and, no more than its engineers or any Tucson subdivider, could it be charged with fraud for having failed to anticipate a 50-year rain. Additionally, while the Government proved that parcels were sold from this unit, they failed to prove the sale of a single parcel in the "big wash area." The same can be said about all of the Government's testimony about washes and terrains in other subdivision units (RT 380-383, 385-392); in no instance did the Government prove that Lake Mead sold any parcel within the specific area that was described. The engineering evidence that the terrain, as disclosed by field inspections, governed the various parcel sizes (Exhibit 52, 53;

see also Exhibit 26) remained uncontradicted.

Subparagraph (c) charged fraud in that appellant did not clearly reveal that "Only a few of the said Lake Mead City subdivision units are adjacent to existing county-maintained roads and many of said subdivision units are not accessible by ordinary passenger motor vehicle."

Again, reference must be made to page 27 of the Exhibit 37 series, which states that the subdivision has "no streets or utilities . . . available." Further, as was indicated in the discussion of subparagraphs (x) and (y) of Paragraph 7, *supra*, roads were available to the Lake Mead subdivision.

Subparagraph (d) provides that:

"Some of the said Lake Mead City subdivision units are separated from others by a high mountain and deep natural drainage wash."

The discussion hereinabove set forth under subparagraph (b) of this paragraph is applicable to the within subparagraph.

Subparagraph (e) provides:

"The nearest of said Lake Mead City subdivision units is approximately 23 miles and the farthest of said subdivision units is approximately 38 miles from the nearest existing electric power and telephone lines."

Again, reference must be made to the fact sheet (Ex. 37), which clearly states that the subdivision was without present city conveniences and that no utilities are available. The fact sheet also clearly states that butane or bottled gas is generally used throughout the area.

Subparagraph (f) provides:

"Most of the said Lake Mead City subdivision units do not have streets for access to lots, street signs, lot corner markers or lot identification markers provided thereon."

The fact sheet (Exhibit 37) contains revelations with respect to this matter, since the fact sheet clearly states that no streets were available. Further, the discussion hereinabove set forth with respect to subparagraphs (dd) and (ee) of Paragraph 7 of the indictment are applicable here.

Subparagraph (g) provides:

"The closest of said Lake Mead City subdivision units is approximately 15 miles and the farthest approximately 40 miles from the nearest place on Lake Mead accessible by existing motor vehicle roads or trails."

This allegation seems to be refuted by the language of Stipulation 22, Exhibit 58, which provides:

"That now and at the times charged in the Indictment, on a straight line, the closest of said Lake Mead City subdivision units, to the nearest place on Lake Mead accessible by presently existing roads was approximately four miles and the farthest approximately seventeen miles."

Of the 20 sections which Lake Mead subdivided, six were accessible by ordinary passenger car, and of the rest all but five were accessible by pick-up, scout or jeep (RT 376-378; 277-279).

Subparagraph (h) provides:

"Some of the said Lake Mead City subdivision units are approximately 28 miles distant by existing roads and jeep trails from the only assured source of drinking water located in Section 7, Township 30 North, Range 16 West."

Again, the Government assumes that by the representation that water was

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The Medical Profession and the Public, J. H. T. Moore, M.D.

The Medical Profession and the Public, J. H. T. Moore, M.D.

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available, appellant was stating that piped-in water was available. As was indicated above, water was plentiful on the Lake Mead subdivision and was available in the manner in which water is usually obtained in desert area lands in Arizona, to wit, delivery by tank truck, from water obtained from the wells on the property owned by Lake Mead City.

IV

THE GOVERNMENT HAS FAILED TO PRESENT TO THE COURT IMPORTANT FACTS BEARING ON THIS CASE

In the introductory portion of this Brief, counsel for appellant set forth certain flagrant factual omissions by the Government. In addition to these omissions, appellant respectfully desires to bring to the attention of the Court certain other similar items.

While it is true that one of the Government witnesses testified that the appellant paid an average of \$40.00 an acre for the property owned by Lake Mead City, this statement must be considered in light of Exhibit 58, Stipulation 19, which provided that the purchase price of the land ranged from a low of \$33.20 per acre to a high of \$125.00 per acre.

On page 10 of the Government's Brief, it is stated that the facts were far different from the representations made by the appellant, in that the appellant "subsequently admitted that its land was totally undeveloped and 'was not suitable in its present state for home building'."

The Government fails to point out to the Court that the initial fact sheet (Exhibit 37 series) sent to all prospective purchasers clearly indicated that the property was without present city conveniences, had no streets or utilities, and that the subdivision was a "brand new project." Other statements contained in the fact sheet indicate that Lake Mead at no time was represented as a fully developed project.

On page 11 of its Brief, the Government apparently is contending that there were misrepresentations made with respect to the proximity of Kingman, Arizona. Yet, again, the fact sheet clearly states (p. 27 of the Exhibit 37 series) that Kingman is "a short 60 miles away."

On page 16 of the appellee's Brief, it is asserted by the Government (which assertion cannot be supported by the record, since there is apparently no record of the proceedings) that appellant's counsel conceded that there was no delay in the mail. Although present counsel for appellant was not present at this proceeding, he is informed that no such concession was ever made.

On page 30 of its Brief, the Government states that the "'refund letter' of appellant was not an unqualified offer of refund and was not made until after Lustiger was interviewed by Postal Inspector Doyle Marshall, to wit, November 10, 1962." This is another instance where counsel for the Government is in possession of facts which she is suppressing. As counsel for the Government is fully aware, the "refund letter" was in the form prepared by appellant's attorney after consultation with Carl Muecke, who was at the time of the instant

prosecution the United States Attorney for the District of Arizona.

On page 44 of its Brief, the Government states that John S. Schaper, who was the partner of appellant's trial counsel, did not have the trial experience of plaintiff's trial counsel. It is appellant's counsel's information, which information certainly must be available to counsel for the Government, that Mr. Schaper is an ex-prosecutor who has a substantial amount of criminal trial experience. Further, it is the information of appellant's present counsel, which information is also at the disposal of counsel for the Government, that Jack Madden, appellant's trial counsel, had never before tried a federal criminal case nor any felony case, jury or otherwise.

V

Appellant will not burden the Court with an exhaustive repetition of the errors previously asserted by appellant. Appellant desires, however, to bring to the attention of the Court several other cases in support of propositions originally raised in Appellant's Opening Brief.

With respect to appellant's contention that the trial court erred in failing to order an inspection of the Grand Jury minutes (V, Paragraph A, of Appellant's Opening Brief), appellant respectfully desires to incorporate herein by reference the entire argument presented by appellant to the trial court, which argument is set forth in the Transcript of Record, pages 30-35, inclusive. Appellant also desires to cite to the Court *Dennis v. United States*,

384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973, wherein the court reversed a conviction and remanded the matter for a new trial because of the refusal of the trial court to allow inspection of the Grand Jury minutes.

With respect to appellant's argument that the trial court erred in denying appellant's Motion for a Bill of Particulars (Appellant's Opening Brief, V, B), the Court's attention is respectfully directed to *United States v. Greve*, 12 F. Supp. 372 (E.D. N.Y. 1934); *United States v. Garrison*, 168 F. Supp. 622 (E.D. Wisc. 1958); *United States v. Hughes*, 195 F. Supp. 795 (S.D. N.Y. 1961).

As is indicated in VIII, Paragraph B, Appellant's Opening Brief, it is appellant's contention that the court erred in refusing to permit the appellant to introduce evidence concerning the practices of other subdivisions in the Mojave County area. In addition to *United States v. Brandt*, 196 F. 2d 653 (2d Cir. 1952), which appellant contends is squarely in point and clearly indicates that the trial court ruled erroneously on this issue, appellant desires to bring to the attention of the Court the following authorities: *Worthington v. United States*, 64 F. 2d 936 (7th Cir. 1933); *Hartzel v. United States*, 72 F. 2d 569 (8th Cir. 1934); *United States v. Shavin*, 287 F. 2d 647 (7th Cir. 1961); and *Kleeden v. United States*, 45 F. 2d 87 (5th Cir. 1930).

It is submitted that the evidence of other projects in the area is clearly relevant to the issues of the case. If the appellant's activities were no different from those engaged in by other subdivisions

in the area, such a fact would constitute strong evidence of good faith on the part of the appellant. Where, as here, intent is an essential element of the crime, the defendant should be and is permitted to prove any fact which throws light on his intention. *Norcott v. United States*, 65 F. 2d 913 (7th Cir. 1933).

Again, and in order not to burden the Court with additional reading material in this case, with respect to appellant's contention that the court below erred in ruling on numerous items of evidence presented to it, appellant hereby respectfully requests the Court's permission to incorporate by reference the claims of error and arguments set forth in the Motion for New Trial made on behalf of appellant, particularly Transcript of Record, pages 289 through 302, inclusive.

Respectfully submitted,

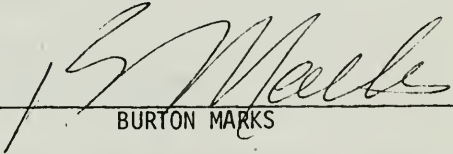
MARKS & SCHNEIDER

BY BURTON MARKS

Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of The United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


BURTON MARKS

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) ss.
County of Los Angeles)

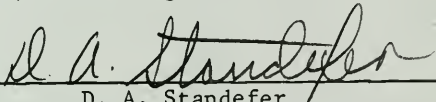
I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on June 24th 1967, I served the within APPELLANT'S SUPPLEMENTAL AND REPLY BRIEF (Lustiger v. United States - No. 20967) on the following named party, by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

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Miss Jo Ann Diamos
Assistant U. S. Attorney
412 Post Office & Federal Building
Tucson, Arizona

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 24th, 1967, at Los Angeles, California.


D. A. Standefer

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